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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TEM MULLENAX et al.,	
Plaintiffs and Appellants,	G039850
v.	(Super. Ct. No. 07CC00219)
DOUGLAS L. MAHAFFEY et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Regan & Associates and James J. Regan for Plaintiffs and Appellants.

Mahaffey and Associates and Douglas L. Mahaffey for Defendants and Respondents.

* * *

Plaintiffs Tem Mullenax and Russell Hayes, the trustee of Mullenax's trust (collectively plaintiff), appeal from a summary judgment in favor of defendants Douglas L. Mahaffey and Mahaffey & Associates (collectively defendant). The court ruled plaintiff's complaint for attorney malpractice and related causes of action was barred by the statute of limitations. Plaintiff contends he did not discover the alleged wrongful conduct until a date within the statutory period, or, alternatively, that the statute of limitations was tolled due to delayed discovery and defendant's continued representation. Finally he argues defendant is equitably estopped to raise the statute. There is no basis to reverse the judgment and we affirm.

FACTS AND PROCEDURAL HISTORY

In 1992 defendant obtained a net $3.4 million settlement for plaintiff who had been injured in a refinery explosion. A portion of the amount was used to fund an irrevocable trust, for which defendant acted as the trustee. The trust purchased several pieces of real property during 13 years. Although unclear it appears that the balance or a large portion of the remaining monies was invested through Merrill Lynch; defendant had a power of attorney as to these funds but plaintiff had access to them.

By the middle of 1999 defendant began sending letters to plaintiff advising that the stock market's volatility was affecting plaintiff's portfolio and warning that "with the rate of money you are spending there is no way I can keep up . . . ." Over the next three years defendant continued to warn plaintiff that if he continued to spend at his current rate, e.g., $40,000 to $50,000 a month in 2000, he would almost deplete his stock account. In 2003 defendant told plaintiff he had only $5,700 in cash and an annuity worth $150,000 and advised him to look for work.

In April 2005 plaintiff hired a lawyer to file a petition in the probate court (Prob. Code, § 15642) seeking an accounting, to remove defendant as trustee of his trust

and to appoint a successor trustee. He alleged defendant had failed to use the trust assets for plaintiff's benefit but had used them for his own benefit and had failed to provide accountings. In the declaration filed in support of the probation petition plaintiff stated he was fully disabled, was not a high school graduate or financially sophisticated, and had "completely trusted" defendant to "act[] with [his] best interests in mind." Plaintiff listed several items about which he was complaining, including defendant's failure to pay premiums for health insurance, resulting in its cancellation and the consequent inability to continue his drug rehabilitation; mismanagement and "sabotage[]" of the sale of some of plaintiff's real property; a belief defendant speculated in the stock market and lost plaintiff's money; and defendant's expenditure of money for other things plaintiff did not understand.

Plaintiff further declared defendant had never explained the trust or sent him statements showing the amount or "location" of his money. In addition, plaintiff had received substantial legal bills for defendant "watching" his investments and other services not performed. He stated that his settlement proceeds should have lasted his lifetime but now he was "out of money," concluding, "I have no idea where my money has gone. I need help."

At some point defendant was ordered to provide an accounting and submitted one for the trust transactions in November 2005 and another for transactions pursuant to the power of attorney in April 2006.

In January 2007 plaintiff filed the instant action, suing defendant for malpractice, breach of fiduciary duty, constructive fraud, and intentional and negligent infliction of emotional distress. In the malpractice count he alleged defendant, in his roles as trustee and attorney in fact, committed a variety of misdeeds in the handling of the trust and accounts subject to the power of attorney, and that defendant in his role as attorney failed to exercise reasonable care in the oversight and management of plaintiff's money. As part of his damages he sought attorney fees incurred in filing the probate

petition for the wrongful acts of defendant as trustee and attorney in fact, which were caused by defendant's negligence. In addition to incorporating the first cause of action, the identical allegations in the breach of fiduciary duty and constructive fraud causes of action pleaded that defendant, as an attorney, breached his duty by failing, among other things, to monitor the trustee and attorney in fact and failing to require "them" to provide accountings. The emotional distress counts were based on the acts alleged in the other causes of action.

The complaint also pleaded that from the time plaintiff initially retained defendant "to the present, or at least to a date within the statutory period of limitations, defendant[] continued to represent plaintiff, and plaintiff relied on [him], with regard to the trusts and power of attorney and the investments relating thereto and the handling of the settlement monies."

Defendant filed a motion for summary judgment or, alternatively, summary adjudication, as to each cause of action on the grounds they were barred by Code of Civil Procedure section 340.6 (section 340.6), the statute of limitations for attorney malpractice. Plaintiff opposed the motion on the same grounds as asserted in this appeal.

In granting the motion for summary judgment the court ruled the one-year statute of limitations under section 340.6 applied. Plaintiff was at least on inquiry notice of the facts underlying the malpractice allegations by the time he filed the probate petition and no triable issue of material fact was raised that the statute had been tolled or that defendant was equitably estopped from asserting it.

DISCUSSION

1. Accrual of Causes of Action

Section 340.6 states: "An action against an attorney for a wrongful act or omission . . . arising in the performance of professional services shall be commenced

within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." This statute also applies to a cause of action for breach of fiduciary duty in the context of legal malpractice (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368) and here to the identical cause of action for constructive fraud as well (see *Jones v. Wagner* (2001) 90 Cal.App.4th 466, 471 ["'breach of a fiduciary duty usually constitutes constructive fraud'" (italics omitted)]; see also *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 70 [in context of attorney malpractice "[c]onstructive fraud may result from a breach of fiduciary duty" and section 340.6 applies].)

The one-year period ""is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' not by his discovery that such facts constitute professional negligence, i.e., by discovery that a particular legal theory is applicable based on the known facts. 'It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.'" [Citation.]' [Citations.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685.) In addition, "'[a] *plaintiff need not be aware of the specific "facts" necessary to establish the claim*; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he] must decide whether to file suit or sit on [his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he] cannot wait for the facts to find [him].' [Citation.]" (*Ibid;* italics added.) "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 807.)

In the trial court defendant prevailed on his argument that plaintiff knew, at least by the time he filed the probate petition, the facts that were the basis of his complaint filed 21 months later. Plaintiff counters that when he filed the probate petition

he did not suspect defendant "the attorney" of any wrongful conduct or legal malpractice. (Bold and capitalization omitted.) Rather, he asserts, the probate petition dealt with defendant as trustee and attorney in fact only. The complaint, on the other hand, alleges defendant, as an attorney, allowed defendant as trustee and attorney in fact to commit the wrongful acts pleaded. Further, plaintiff maintains that what he knew at the time of the probate petition is a question of fact that defeats a summary judgment. This analysis is flawed.

Plaintiff's separation of defendant as attorney from defendant as trustee and attorney in fact is artificial and unpersuasive. The same alleged misconduct forms the basis of the petition and the complaint and supports a claim against defendant as an attorney as well as in his capacity as trustee and attorney in fact. In the probate petition plaintiff pleads defendant used the trust assets for his own benefit, mismanaged his money and failed to account for it, speculated in the stock market, interfered with and stopped the sale of his real property, billed for services he did not perform, and engaged in other wrongful acts and omissions. In the complaint plaintiff alleges these and more negligent acts and omissions but puts a gloss on some of them by pleading defendant, as attorney, failed to monitor himself when acting as trustee or attorney in fact. There is no new conduct here that plaintiff did not know or could not have reasonably discovered at the time he filed the probate petition. This is apparent from the probation petition itself.

Neither *Fox v. Ethicon Endo-Surgery, Inc*., *supra*, 35 Cal.4th 797 nor *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, on which plaintiff relies, saves this action. In *Norgart* the court addressed the delayed discovery rule in the context of a wrongful death suit. The court stated that a "plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects . . . that someone has done something wrong' to him [citation], 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding' [citation]. . . . *[H]e need not know the*

'specific "facts" necessary to establish' the cause of action; rather he may seek to learn such facts through the 'process contemplated by pretrial discovery' . . . ." (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at pp. 398-399, fn omitted, italics added.) Here, at the time of filing the probate petition plaintiff knew or at least suspected defendant had done something to hurt him.

Plaintiff argues he did not learn of defendant's alleged negligence until he received the lengthy accountings defendant produced in the probate proceeding and took defendant's deposition. But, according to *Norgart*, he did not need to know the specifics of the alleged wrongdoing, only that he knew or believed it had been committed.

Fox was a pleading case where the court held that when a "plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for [a] cause of action[,]" the statute of limitations will run. (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at p. 803.) For delayed discovery to apply, a plaintiff must show "'the time and manner of discovery and . . . the inability to have made earlier discovery despite reasonable diligence.' [Citation.]" (*Id*. at p. 808.) "[A] potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run . . . when the investigation would have brought such information to light." (*Id*. at pp. 808-809.) This rule does not come into play here because at the time of the probate petition plaintiff already had a factual basis for a cause of action against defendant. Again, that he did not have all the details later revealed in the accounting and discovery is beside the point.

We reject plaintiff's assertion that statements made in the probate petition cannot be considered because they are not admissions in this case. The statements are not being used as admissions but as evidence of plaintiff's state of mind and knowledge.

Plaintiff's claim defendant had him convinced it was plaintiff's profligate spending that depleted the funds does not change the result. He alleged in his probate petition that defendant had mismanaged funds and property. He points to his statement in that proceeding, "I have no idea where my money has gone," arguing this raises a triable issue of fact about what he knew at that time. But the claim he did not know where his money went does not contradict allegations it was defendant's misconduct that lost his money. Further, "'a party cannot rely on contradictions in his own testimony to create a triable issue of fact.'" (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861.) And as stated in *Johnson v. Haberman & Kassoy* (1988) 201 Cal.App.3d 1468, 1476, which plaintiff cited, "where reasonable minds can draw but one conclusion from the evidence," "[t]he question of when there has been a belated discovery of [a] cause of action . . . becomes a matter of law. [Citations.]" Such is the case here. Coming to this conclusion did not involve weighing of facts but only a recognition there is no triable issue of material fact.

In sum, the undisputed facts show that at the time he filed the probate petition plaintiff knew or reasonably should have discovered facts showing defendant's alleged negligence. The delayed discovery rule did not postpone accrual of the statute of limitations until the time plaintiff filed the complaint.

2. Defendant's Continued Representation of Plaintiff

Plaintiff asserts that even assuming he knew or should have known of the facts constituting the alleged malpractice more than a year before he filed his complaint, the statute of limitations was tolled because defendant continued to represent him up until a time within the limitations period and that the actual date defendant stopped doing so is a question of fact. Neither argument persuades.

A complaint for attorney malpractice must be brought "within one year after the plaintiff discovers, or through the use of reasonable diligence should have

discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that . . . [¶] . . . [¶] [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred[.]" (§ 340.6, subd. (a)(2).) The purposes of tolling based on continuous representation are "to 'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.' [Citation.]" (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618; accord *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 511.)

In his declaration in support of the motion for summary judgment defendant stated he had not had an attorney-client relationship with plaintiff since 1997 or at least since plaintiff filed the probate petition in March 2005. In opposition, in the motion and here, plaintiff points to various activities he claims show continuing legal representation. The first is the fact the accountings required in the probate action were not completed until April 2006. But accounting for funds in the trust and subject to the power of attorney was not a legal service. It was performed as a result of the probate court's order.

Plaintiff stresses that defendant "was wearing multiple hats" and that as the lawyer he "continued to assist and represent [plaintiff]" and "offered his cooperation" regarding the trust and power of attorney "even after the probate petition . . . was filed." This, according to plaintiff, took the form of "[p]roviding assistance relating to the accounting, or at least disclosing relevant information to [plaintiff] . . . ." Contrary to plaintiff's claim these acts cannot be characterized as "unsettled [legal] matters tangential to [plaintiff's] case[.]" (*O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 121.) Again, they were pursuant to an order to account. Other than acts in connection with the probate

action, after the petition was filed defendant ceased performing any services for plaintiff more than one year before the complaint was filed.

Plaintiff asserts he never asked defendant to discontinue his representation and even after the probate petition was filed "still believed in [defendant]." But "[t]he test for whether the attorney has continued to represent a client on the same specific subject matter is objective . . . ." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528) and plaintiff's continued belief in defendant is not sufficient.

Plaintiff points to letters and billings from defendant as evidence of continuing representation. Without discussing whether these in fact were legal services, except for the instance discussed shortly, none of these documents shows any activity beyond November 2005. Thus, even if there was legal representation, it occurred more than one year prior to the filing of the complaint and would not have any effect on the statute of limitations.

The one activity after November 2005, occurring in June 2007, was a transmittal of a bank account statement for the trust by someone in defendant's law firm on law firm letterhead to the new trustee. There is no way this can be categorized as rendering legal services. Nor does the mere fact that defendant did not formally resign as the trustee until three weeks after the complaint was filed evidence continued representation.

Plaintiff also relies on certain other documents he claims show a continuing legal relationship. We cannot consider them because they were not part of his opposition to the summary judgment motion but were submitted with a motion for reconsideration which the trial court denied. Likewise allegations in the complaint alone are not sufficient to defeat a summary judgment. (*Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411.)

There was no continuing representation that tolled the statute of limitations.

3. Equitable Estoppel

Plaintiff maintains that even if the statute of limitations had run by the time the complaint was filed defendant should be equitably estopped from raising it because he continued to represent plaintiff, told plaintiff it was his profligate spending that depleted the funds, and failed to provide a timely accounting thereby interfering with plaintiff's ability to discover any wrongdoing. As plaintiff notes, "a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period . . . ." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at p. 686.)

None of defendant's alleged actions induced plaintiff to forebear from timely suing him. As discussed above at the time plaintiff filed his probate petition he had sufficient knowledge to file a malpractice complaint. And he had another lawyer representing him. So whether plaintiff himself was uneducated or unsophisticated is not relevant. Nothing defendant purportedly did or failed to do prevented plaintiff from filing the action at that time or within one year of that date. Equitable estoppel does not apply.

At oral argument plaintiff argued willful concealment under section 340.6, subdivision (a)(3), relying on the claim that defendant failed to provide required quarterly accountings. But we need not consider an issue raised for the first time at oral argument. (*Kajima Engineering and Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924, fn. 2.) Even on the merits, however, it does not persuade because willful concealment only tolls the four-year limitation period, not the one-year term at issue here.

4. Emotional Distress Claims

Causes of action for emotional distress are governed by Code of Civil Procedure section 335.1, which provides a two-year limitations period. Plaintiff did not

address the statute of limitations as to his two emotional distress causes of action in his briefs. Thus we deem any challenge to the summary judgment as to them abandoned. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.